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No. 04-242

Supreme Court, U.S.
FILED
OCT 6 - 2004
OFFICE OF THE CLERK

In the

Supreme Court of the United States

ESTER P. EMMERMAN AND RONALD Z. EMMERMAN

Petitioners,

v.

CITY OF HIGHLAND PARK, ILLINOIS, ET AL.

Respondents.

On Petition for Writ of Certiorari to the Appellate Court of Illinois, Second District

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS ESTER P. EMMERMAN AND RONALD Z. EMMERMAN

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to this Court's Rule 37(b), the National Association of Home Builders respectfully requests leave of the Court to file this brief amicus curiae in support of Petitioners Ester and Ronald Emmerman. Written consent for amicus participation in this case was withheld by Respondent City of Highland Park. Written consent was granted by counsel of record for Petitioners.

INTEREST OF AMICUS CURIAE

The National Association of Home Builders ("NAHB") represents over 215,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers and remodelers. It is the voice of the American shelter industry. It is, therefore, concerned with any judicial decision that calls into question the remedy available to its members under the Fifth Amendment when land use regulators take private property for public use without the payment of just compensation.

NAHB, whose members are highly dependent on land use decisions made by government bodies, has appeared before this Court as amicus curiae, of counsel, or a party in a number of cases involving the rights and remedies of landowners who have been adversely affected by governmental actions. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Dolan v. City of Tigard*, 512

U.S. 374 (1994); *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687 (1995); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *City of Cuyahoga Falls v. Buckeye Cmty. Hope Found.*, 538 U.S. 188 (2003); *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 124 S. Ct. 1537 (2004).

For these reasons, the motion of National Association of Home Builders to file a brief amicus curiae should be granted.

DATED: October, 2004.

Respectfully Submitted,

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National Association of Home Builders respectfully submits this brief amicus curiae in support of the petition for certiorari filed by Petitioners Ester and Ronald Emmerman on August 19, 2004.[1]

I. SUMMARY OF ARGUMENT

The case below presents the Court with an opportunity to clarify an open question in its takings jurisprudence: how should lower courts define the relevant parcel of land for the purpose of determining whether a government regulation has effected a compensable regulatory taking under the Fifth Amendment. Given the confusion and conflicting views of this question in the lower courts, the Court should grant the petition to clarify the manner in which courts should determine the relevant parcel.

II. ARGUMENT

In 1992, this Court confronted a landmark property case and held that a South Carolina beachfront building restriction amounted to a compensable regulatory taking. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Although the owner of land retained title, the Court recognized that the "regulation denie[d] all economically beneficial or productive use of the land," amounting to the functional equivalent of a physical taking. *Id.* at 1015. This principle was based upon Justice Holmes' oft-quoted assertion that "while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a

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[1] In accordance with Rule 37.6, Amicus Curiae confirms that this brief was not written by counsel for any party in this matter and that no person or entity made a monetary contribution specifically for the preparation of this brief.

taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The *Lucas* Court recognized that "[its] decision in *Mahon* offered little insight into when, and under what circumstances, a given regulation would be seen as going 'too far,'" *Lucas*, 505 U.S. at 1015, but it did not need to provide a more precise definition because the trial court found that the regulation in question "left each of Lucas' beachfront lots without economic value." *Id.* at 1016 n.7. The Court held that "on numerous occasions" its decisions had established that "categorical treatment [is] appropriate ... where regulation denies *all* economically beneficial or productive use of land." *Id.* at 1015-16 (emphasis added).

A. The Relevant Parcel Issue

At the same time, the *Lucas* Court admitted that "the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." *Id.* at 1016 n.7. Indeed, this "relevant parcel" question is a crucial threshold issue for all takings analyses, but it has received little judicial attention in comparison to the question of how a regulation affects the economic uses of a parcel. The relevant parcel is the denominator in the takings fraction, so any comparison of before and after values necessarily hinges on a uniform method of determining the relevant parcel. Otherwise, the court finds itself in the same position as a grade school child trying to add fractions with different denominators: without a common denominator, the calculation is impossible. As the *Lucas* Court recognized, however, the relevant parcel issue remains "unclear." *Id.* Indeed, "this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court," further muddying the water. *Id.*

The *Lucas* Court was able to sidestep the relevant parcel question because it was irrelevant to the disposition of that case: the numerator was zero (because the regulation denied all economically viable use), so the value of the takings fraction was the same regardless of the denominator. Still, the issue looms large, and each passing year sees greater conflict in takings jurisprudence as lower courts struggle to make sense of contradictory precedent from this Court. These courts have criticized *Lucas* not for its holding but because this Court missed "a much-heralded opportunity to clarify how courts were to balance public interest claims against liberty claims of private property owners..." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1178 (Fed. Cir. 1994); *see also District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 887-888 (D.C. Cir. 1999) (Williams, J., concurring).

To protect and preserve property rights, "[s]tate and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution." *Planned Parenthood v. Casey*, 505 U.S. 833, 845 (1992). This case, by highlighting the relevant parcel question, provides the Court with an ideal opportunity to answer the lower courts' requests for guidance and clarify a vexatious issue in property law. A clear relevant parcel precedent would resolve conflict among lower courts while advancing the interest of judicial economy by giving litigants a dependable and reliable standard by which to judge their dispute. Therefore, this Court should grant certiorari.

B. This Court's Relevant Parcel Jurisprudence Has Produced More Questions Than Answers

1. Conflicting Answers to the Relevant Parcel Question: *Mahon* and *Keystone*

The first major regulatory taking case was *Mahon*, in which Justice Holmes made his famous assertion that a regulation that "goes too far" violates the Takings Clause. 260 U.S. at 415. In this case, the Pennsylvania Coal Company appealed an injunction that prevented it from coal mining that would have caused subsidence on the plaintiffs' property. Although the plaintiffs owned only the surface rights to the property, the Kohler Act in Pennsylvania restricted the company's ability to exercise its mining rights under the property by requiring it to leave intact enough subterranean support to keep the mines from collapsing and causing subsidence on the surface. The company argued that the Kohler Act as applied amounted to a taking of the coal left in the ground as support, violating the Fifth Amendment's Takings Clause. Despite the "public interest" furthered by the Kohler Act, the Court struck it down, holding that "[t]o make it commercially impracticably to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Implicitly, then, the Court reached this decision by defining the relevant parcel narrowly: the regulation was invalid because it prohibited all economic use of the "certain coal" that could not be mined, despite the fact that the company could still mine other coal on its property.

Over half a century later, this Court considered an almost-identical question, and it reached the opposite conclusion. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). Quoting Justice Holmes' admission that "the question depends upon the

particular facts," *Mahon*, 260 U.S. at 413, the *Keystone* Court ignored the logic of *Mahon* because now it was "address[ing] a different set of particular facts' ..." *Keystone*, 480 U.S. at 474. Like *Mahon*, however, the central issue in *Keystone* was whether a Pennsylvania law requiring coal mining companies to leave enough support in the ground to prevent subsidence was a regulatory taking. Unlike *Mahon*, the *Keystone* Court found that no compensable taking. This outcome depended entirely on the *Keystone* Court's definition of the relevant parcel:

> The 27 million tons of coal [that must be left in the ground as support] do not constitute a separate segment of property for takings law purposes. Many zoning ordinances place limits on the property owner's right to make profitable use of some segments of his property. ... There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property.

Id. at 496-97.

Remarkably, the Court reached this determination despite its recognition that "Pennsylvania property law is apparently unique in regarding the support estate as a separate interest in land that can be conveyed apart from either the mineral estate or the surface estate." *Id.* at 497-98. This would seem to strengthen the *Mahon* argument that only the support estate should be considered the relevant parcel, but the Court nevertheless chose to aggregate the support and mineral estates and consider them together as one relevant parcel. It explicitly refused to let "the result turn on whether state law allowed the separate sale of the segment[s] of property." *Id.* at 498.

In dissent, Chief Justice Rehnquist criticized this approach. He underlined the contradictions between the *Keystone* majority opinion and the *Mahon* decision, rejecting the majority's insistence that the particular facts in *Keystone* justified the dramatically different result. *See id.* at 518-520 (Rehnquist, C. J., dissenting). Although he acknowledged that defining the relevant parcel was an "admittedly difficult task," *id.* at 514, the Chief Justice insisted that traditionally the Court "evaluated takings claims by reference to the units of property defined by state law." *Id.* at 518-19. Under his reading of the Court's precedent, "where the estate defined by state law is both severable and of value in its own right, it is appropriate to consider the effect of regulation on that particular property interest." *Id.* at 520. Therefore, Chief Justice Rehnquist advocated defining the relevant parcel narrowly, as the *Mahon* Court had done, and finding that a compensable taking had occurred.

2. Making Sense of the Contradiction: *Penn Central* and *Andrus*

Although the factual similarities between *Keystone* and *Mahon* highlight this Court's divergent approaches to the relevant parcel question, what is most notable about the decisions is that the *Keystone* Court took great care to reaffirm *Mahon* and cast its decision squarely within the *Mahon* precedent. *Id.* at 474. Both approaches remain good law, and lower courts are left to decide whether to define relevant parcel broadly (as in *Keystone*) or narrowly (as in *Mahon*) by attempting to divine the factual differences cited, but not enumerated, by the *Keystone* Court.

Indeed, *Keystone* may best be read as the logical extension of another regulatory takings case, *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978), rather than as a member of the *Mahon* family. *Penn Central* involved an

effort to erect a 55-story tower on top of New York City's Grand Central Terminal, which the City had designated a protected historic landmark. Penn Central, the owner of the property, sued the City when the Landmarks Preservation Commission denied permission to build the tower. The railroad alleged that the ruling deprived it of the use of its air rights without compensation, violating the Takings Clause.

The Court rejected this approach for several reasons, one of which was its definition of the relevant parcel. According to the majority:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated....[T]his Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the "landmark site."

Id. at 130-31. It reconciled this broad relevant parcel determination with *Mahon* by denying "that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably ... constitutes a 'taking.'" *Id.* at 131 n.27.

In so doing, the Court recast the *Mahon* Court's definition of relevant parcel. Although Justice Holmes explicitly noted that his decision was based on the fact that the regulation made it "commercially impracticable to mine *certain* coal," *Mahon*, 260 U.S. at 414 (emphasis added), the *Penn Central* majority believed the decision was really based on the coal company's expectation that it was buying rights that could be completely exploited, causing it to pay a higher

investment price than it would have paid if the restriction had been in effect at the time of purchase. Indeed, the *Penn Central* Court asserted that *Mahon* was decided "irrespective of the impact of the restriction on the value of the parcel as a whole," thereby implying that the *Mahon* Court never decided the relevant parcel question at all. *Penn Central*, 438 U.S. at 131 n.27.

Regardless of how *Penn Central* characterized *Mahon*, future courts seized on *Penn Central's* sweeping rejection of efforts to "divide a single parcel into discrete segments" as the central lesson of the case. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326-27 (2002) ("*Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on 'the parcel as a whole'."). However, as Chief Justice Rehnquist later pointed out, "[t]he Court [in *Penn Central*] gave no guidance on how one is to distinguish a 'discrete segment' from a 'single parcel.'" *Keystone*, 480 U.S. at 517 n.5 (Rehnquist, C. J., dissenting). In effect, then, the anti-severance principle from *Penn Central* is superfluous; of course the Court will not divide the relevant parcel, but the court still must determine what the relevant parcel is.

The year after *Penn Central*, the Court had the opportunity to clarify its relevant parcel ruling and instead added more confusion to the jurisprudence. In *Andrus v. Allard*, 444 U.S. 51 (1979), the Supreme Court addressed a challenge to wildlife protection statutes that prevented the sale and trade of some Native American artifacts because they included feathers from protected eagles killed long before the statutes were enacted. Dealers in the artifacts challenged the law, arguing that the regulation deprived their

property of its value by preventing its sale and trade. The Court disagreed:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety.

Id. at 65-66. Therefore, although it is "undeniable that the regulations here prevented the most profitable use of appellees' property," the property was not taken because the regulations did not remove all sticks from the bundle; "for example, [the dealers] might exhibit the artifacts for an admissions charge." *Id.* at 66. The relevant parcel, it seemed, was every possible use of the property at issue, and as long as any potential use remained, the Court would not find that the regulation had "gone too far."

Perhaps, then, *Keystone* can only be understood in the context of *Penn Central* and *Andrus*. Following on the heels of the strong language in those cases, it stands to reason that the Court would focus on the profitable uses of the coal company's property that remained in their bundle rather than the sticks that could no longer be exploited. But the *Keystone* Court took this analysis a step further, not only considering the bundle of property rights in the support estate but also aggregating that (empty) bundle with the (full) bundle of rights in the mineral estate.

Lower courts have read this progression as evidence of a presumption of aggregation, which "tends to reduce the likelihood that courts will order compensation." *District Intown*, 198 F.3d at 885 (Williams, J., concurring). The danger of such a presumption is that it will eventually butt heads with the Takings Clause if it is not carefully applied. As the *Penn Central* Court recognized, "the 'Fifth Amendment's guarantee ... [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole'." 438 U.S. at 123 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). Setting the presumption too strongly against compensation undermines this purpose by sacrificing "fairness and justice" for judicial simplicity.

3. Another Change in Jurisprudence: *Lucas* and *Palazzolo*

Recognizing the danger of defining relevant parcel too broadly, the *Lucas* Court signaled, in dictum, a retreat from *Penn Central's* strong endorsement of aggregation. After noting the confusion produced by its relevant parcel jurisprudence, the Court turned its sights to *Penn Central's* "extreme – and, we think, unsupportable – view of the relevant calculus." *Lucas*, 505 U.S. at 1016 n.7. Again in dictum, the Court moved toward the approach Chief Justice Rehnquist advocated in his *Keystone* dissent, writing that "the answer to this difficult question [i.e., relevant parcel] *may* lie in ... whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* (emphasis added). Unfortunately, this retreat did takings jurisprudence more harm than good, both because it was signaled in dictum and because it was poorly defined. As

Judge Williams of the D.C. Circuit lamented, although "[t]he Court arguably evidenced a retreat from this strong position [taken in *Penn Central*] ... [it] has not, however, reached agreement on the scope of this retreat." *District Intown*, 198 F.3d at 887-88 (Williams, J., concurring).

Therefore, although the Court has come almost full circle – from *Mahon* to *Keystone* and *Penn Central* and back to a *Mahon*-like, narrow definition of relevant parcel in *Lucas* – lower courts are not sure where exactly on the circle *Lucas* left them. Indeed, this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), indicated that it, too, was unsure of the proper relevant parcel definition after *Lucas*. Although the *Palazzolo* Court avoided the relevant parcel issue because of procedural matters, in its brief discussion of "the difficult, persisting question of what is the proper denominator in the takings fraction," the Court recognized the contradictions that developed in its own jurisprudence following *Penn Central*: "Some of our cases indicate that the extent of the deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule." *Palazzolo*, 533 U.S. at 631 (citations omitted). If this Court cannot decide how to interpret its own decisions, it is no surprise that lower courts have encountered great difficulty – as well as vastly different results – in their attempts to do so.

C. Confusion in This Court's Relevant Parcel Jurisprudence Has Caused a Circuit Split

Barely two years after *Lucas*, the Federal Circuit Court of Appeals was invited to try to make sense out of this Court's relevant parcel jurisprudence in *Loveladies*. 28 F.3d 1171 (Fed. Cir. 1994). In 1958, Loveladies purchased 250 acres of land located on Long Beach Island, Ocean County,

New Jersey. *Id.* at 1174. In 1972, the passage of the Clean Water Act brought 51 of those acres – which were wetlands that had yet to be developed – under the control of the Army Corps of Engineers. *Id.* Loveladies also needed permission from the New Jersey Department of Environmental Protection to fill 50 of those acres (one had been filled prior to 1972), and it eventually secured permission from the state to develop 12.5 of the 51 acres. *Id.* Since one of those acres was already filled, the agreement with the state allowed Loveladies to fill 11.5 acres. *Id.*

Loveladies then applied for permission from the Army Corps of Engineers to implement the agreement it had reached with the state. *Id.* The Corps denied Loveladies' application, and the company brought suit for a regulatory taking in the Court of Federal Claims. *Id.* The court ruled in Loveladies' favor, finding that there was a taking because the permit denial caused "greater than 99% diminution of [the land's] value." *Id.* at 1175. The Government appealed.

The Court of Appeals began its consideration of the case by framing the question it thought was presented: "The question at issue here is, when the Government fulfills its obligation to preserve and protect the public interest, may the cost of obtaining that public benefit fall solely upon the affected property owner, or is it to be shared by the community at large." *Id.* The court acknowledged that its answer to that question hinged on two aspects of "the Denominator Problem." *Id.* at 1179. First, the court needed to determine "whether a regulatory taking requires that there be a denial of essentially *all* remaining economic use, or whether loss of a substantial part, but not all, of the economic use may constitute a compensable taking." *Id.* In other words, the court needed to decide how many sticks may be taken from the *Andrus* bundle before a taking occurs. The precedent, however, was far from clear: "The earlier

cases sometimes use language suggesting that [*all* economic use must be lost], and sometimes did [sic] not. *Lucas* itself contains a discussion that acknowledges both viewpoints." *Id.* at 1179-80.

Recognizing that the answer to the first question necessarily turned on the relevant parcel issue, the court then turned to that "key question." *Id.* at 1180. The facts of the case gave the court the choice of many potential relevant parcels. The government argued that the relevant parcel was either the original 250 acres or, alternatively, the 51 acres that remained undeveloped when the permit was denied. Loveladies, on the other hand, argued that 38.5 of the 51 acres were "dedicated to the state in return for the NJDEP permit," so they should not be considered part of the relevant parcel. *Id.*

The Court of Appeals agreed with Loveladies. It affirmed the lower court's determination that the relevant parcel was only the 12.5 acres that could have been developed under the state agreement but were rendered useless by the federal permit denial. Excluding the contiguous 38.5 acres, although they were part of the original parcel purchased by Loveladies, was "only logical since whatever substantial value that land had now belongs to the state and not to Loveladies." *Id.* at 1181. Using this narrow definition of the relevant parcel, the court returned to the first question it had posed. It held:

> This is not, then, a case of a partial taking, involving linedrawing between noncompensable 'mere diminution' and compensable partial taking. Rather, this is a case in which the owner of the relevant parcel was deprived of all economically feasible use.

Id. at 1181-82 (citations omitted). Therefore, the court ruled that Loveladies was entitled to compensation.

Five years later, the D.C. Circuit Court of Appeals was confronted with a similar issue, and it reached a very different conclusion. In *District Intown*, 198 F.3d 874, the court heard a suit alleging that the District had effected a regulatory taking by denying building permits on lots that had recently been designated historic landmarks. In 1961, District Intown purchased an apartment building and adjacent landscaped lawns in a single transaction. *Id.* at 877. Twenty-seven years later, in 1988, District Intown subdivided the property into nine lots; one lot contained the apartment building, and the other eight were lawn lots on which District Intown planned to build townhouses. *Id.* The following year, the District of Columbia designated all nine lots historic landmarks, bringing them under the control of the Historic Preservation Review Board. *Id.* The Board then denied building permit applications by District Intown in 1991 and 1992 because "construction on the lawn would be incompatible with its historic landmark status." *Id.* at 878. District Intown filed suit in federal court, alleging an uncompensated regulatory taking, and it appealed a summary judgment entered against it.

On appeal, the court recognized that "[u]nder both *Lucas* and *Penn Central* ... we must first define what constitutes the relevant parcel before we can evaluate the regulation's effect on that parcel." *Id.* at 880. This question, in turn, boiled down to whether the lot containing the apartment building should be considered part of the relevant parcel. If not, the unbuildable lawn lots would have suffered an almost complete diminution in value. If so, however, the nine-lot parcel would retain significant value because of the apartment building.

The court held that all nine lots together formed the relevant parcel. *Id.* at 877. It reached this decision by inquiring "how both the property owner and the government treat (and have treated) the property," *id.* at 880, and it endorsed a four-factor analysis of the issue. The district court had considered "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot," and it found that all four weighed in favor of treating the nine lots as one unit. *Id.* (citing *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Cl. Ct. 1991)). Aside from "[t]he intentional act of subdivision," neither court found any evidence that the property was treated separately by the company in acquiring, maintaining and managing it. *Id.* Therefore, the Court of Appeals affirmed the decision to treat all nine lots as one relevant parcel, and it likewise affirmed the ruling that there was no compensable taking.

The fact that the courts reached different outcomes in *District Intown* and *Loveladies* is not troubling in itself because the Supreme Court has repeatedly recognized that takings cases require "essentially ad-hoc, factual inquiries." *Keystone*, 480 U.S. at 495. Still, the lower courts' discussions of the relevant parcel issue reveal vastly different understandings of the state of the law. This leaves open the distinct possibility that both cases would have come out differently if they had been litigated in the other court. For example, the *District Intown* court justified treating all nine lots as one parcel on the following grounds:

> The lots are spacially and functionally contiguous. District Intown purchased the property as a whole in 1961 and treated it as a single indivisible property for more than 25 years. District Intown presented no

> evidence that, even after subdivision, it treated the lawn lots separately from Lot 106, the lot that contains the apartment building...

District Intown, 198 F.3d at 880. However, the same can be said of the property in *Loveladies*: the land at issue was "spacially and functionally contiguous," purchased together, and managed jointly for more than 25 years. The only difference between any of the lots in the 250 acres was that some of them were filled and sold before the Clean Water Act was passed and others were not. Similarly, one of the nine *District Intown* lots was developed before the parcel was designated a historic landmark, while the others were not. The *Loveladies* court conceptually severed the lots based on when they were developed, but the *District Intown* court found that factor irrelevant.

Therefore, it appears that the *District Intown* court ignored the factors that underlay the *Loveladies* decision, and the *Loveladies* court discounted the considerations that underpinned *District Intown*. This conflict in the circuits will not resolve itself, and it is up to this Court to articulate a clear theory to guide all the circuits in their relevant parcel jurisprudence.

D. Federal Trial Courts Are Also Confused By the Relevant Parcel Issue

Not surprisingly, the uncertainty about the relevant parcel evident in the opinions of the Supreme Court and Courts of Appeals has been magnified as lower courts have struggled with the same issues. Two cases should be sufficient to illustrate this point. Both cases considered allegations of regulatory takings after permit denials by the Army Corps of Engineers. Both were decided in the late 1990s by the same court, the United States Court of Federal

Claims. Despite these similarities, the outcomes of the cases were very different.

In 1997, the court decided *Forest Properties, Inc. v. Big Bear Municipal Water District*. 39 Fed. Cl. 56 (Fed. Cl. 1997). That case involved the denial of a dredge and fill permit for 9.4 acres of lakebottom property adjoining 53 upland acres under the same ownership. Although the court cited the same four factors later cited by the Federal Circuit in *District Intown*, it discounted evidence of "the different dates upon which the upland property was acquired and the option rights [to purchase the lakebottom property] were transferred, the separate consideration that was paid for the upland property, and the option rights." *Forest Properties*, 39 Fed. Cl. at 73. Indeed, it observed that "[t]his court must be wary of focusing solely on the particular facts of a transaction." *Id.* The court, instead, "should focus on how the economic expectations of the claimant, with respect to the parcel at issue, have shaped the owner's actual and projected use of the property." *Id.* In the end, the court found that "FPI's economic intentions were to utilize the lakebottom acreage and the upland parcel in conjunction with each other as one income-producing unit." *Id.* at 74. Therefore, it chose to treat all 62 acres as the relevant parcel, and it found that the permit denial caused a mere diminution in value, not a compensable taking.

Two years later, the court was again invited to address an alleged regulatory taking. *Florida Rock Industries, Inc. v. United States*, 45 Fed. Cl. 21 (Fed. Cl. 1999). This time, the Corps denied a permit to mine limestone on land Florida Rock had purchased for that purpose just before the Clean Water Act Amendments passed in 1972. First, Florida Rock applied for a permit to mine the entire 1,560 acre parcel, and this application was denied because "the Corps indicated it would only consider

applications covering mining needs sufficient to satisfy a three year period." *Id.* at 25. Then, Florida Rock again applied for a mining permit, this time only for the 98 acres it could mine in three years. This application was also denied. *Id.*

In considering Florida Rock's taking claim, the Court of Federal Claims determined that the relevant parcel was the 98 acres for which the permit had been denied. *Id.* at 33. It refused to entertain the notion that Florida Rock's inability to mine 6 percent of its wholly-owned contiguous property merely diminished the value of the entire lot. Instead, the court observed that "[r]egulations often require courts to look at entire parcels to determine their impact, but that does not mean property only exists in the form of the entire parcel." *Id.* at 43. Finding that "[t]he frustration of Florida Rock's reasonable investment-backed expectations is beyond doubt ... [and] absolute," the court ruled that the 98 acres at issue had been taken by regulation and Florida Rock was entitled to just compensation. *Id.* at 41.

It is difficult to square this decision with *Forest Properties*. The court in *Florida Rock* was willing to sever 98 wetland acres from 1,462 contiguous and indistinguishable wetland acres owned by the same company and intended for the same purpose, but the *Forest Properties* court refused to sever 9.4 lakebottom acres from 53 upland acres that were purchased separately. Both Florida Rock and Forest Properties purchased the land in question as an investment with expectations that it could be exploited profitably. Both saw their expectations frustrated by the denial of federal permits. Only one received compensation. The confusion and contradiction in the relevant parcel jurisprudence evidenced by these two opinions is representative of the struggle faced by lower courts nationwide in trying to make sense of the "partial theories

and broken concepts" that litter "the landscape of taking law." *Florida Rock*, 45 Fed. Cl. at 23.

III. CONCLUSION

The same year that *Lucas* was decided, this Court famously remarked that "[l]iberty finds no refuge in a jurisprudence of doubt." *Casey*, 505 U.S. at 844. This Court should grant the Emmermans' petition for certiorari to clarify the difficult issue of relevant parcel for litigants and courts across the country.

DATED: October, 2004.

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